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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

November 18, 1998

EX PARTE

Via Federal Express

The Honorable William E. Kennard
Chairman
Federal Communications Commission
1919 M Street, N.W., Room 814
Washington, D.C. 20554

Re: CC Docket Nos. 96-98; 98-79; 98-103; 98-161; CCB/CPD 97-30

Dear Mr. Kennard:

Epoch Internet (Epoch) would like to express its profound concern about the outcome of a recent tariff decision by the Commission, and the potential long-term implications for this country's vibrant information services and Internet-based industries. In particular, Epoch urges you not to take any action which could lead to, or have the effect of, inviting federal common carrier-type regulation of the Internet.

As you know, last Friday the FCC found that GTE's ADSL service, which permits information service providers ("ISPs") to provide their end user customers with high-speed access to the Internet, is an interstate service that is properly tariffed at the federal level.¹ In that GTE ADSL Tariff Order, the Commission posed the question presented as "how Internet traffic fits within our existing regulatory framework." The FCC concluded that the jurisdictional nature of ADSL service is determined by the originating point of the ISP's customer, and the likely multiple points from which the ISP will retrieve information requested by that end user. Under this view, the GTE ADSL Tariff Order determined that the communications services used by the end user do not terminate at the ISP's local server, "but continue to the ultimate destination or destinations, very often at a distant Internet website accessed by the end user." Thus, the Commission views ISP traffic as "a continuous transmission from the end user to a distant Internet site." In essence, the FCC for the first time has classified the ISP's business, not as an unregulated information service, but as part and parcel of an end-to-end communications service that is subject to the FCC's full regulatory jurisdiction.

Epoch is deeply troubled and concerned about the implications of the FCC's thinking in the GTE ADSL Tariff Order. Based on its understanding of the relevant precedent, Epoch disagrees with the Commission's view that GTE's ADSL service offering is inherently interstate. More to the point, however, to the extent the FCC now is considering the proper jurisdictional nature of locally dialed calls terminating to an ISP's point of presence, such as a server or modem pool, within a local exchange area, there can be no doubt but that such calls are jurisdictionally local. For the last twenty years, culminating with the Telecommunications Act of 1996, the federal government consistently has viewed ISPs as end users, not common carriers, and has deemed the information services industry off-limits to common carrier-type regulation. Unfortunately, the GTE ADSL Tariff Order does not appear to recognize that unbroken string of precedent. Indeed, the Commission's fundamental factual error in the GTE Order -- equating Internet service providers with IXC's, rather than with other ordinary business end users -- would be compounded exponentially if applied to dial-up, circuit-switched traffic to ISPs.

In that regard, Epoch believes that the California Public Utilities Commission -- one of twenty-three state commissions, along with three federal courts, unanimously to find that calls to ISPs are local in nature -- got this issue exactly right. The California PUC asked the fundamental question in the

¹ In the Matter of GTE Telephone Operating Cos., GTOC Tariff No. 1, GTOC Transmittal No. 1148, Memorandum Opinion and Order, CC Docket No. 98-79, issued October 30, 1998 ("GTE ADSL Tariff Order").

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proper way: whether "this network of computer systems comprising the Internet can properly be characterized as a telecommunications network for purposes of measuring the termination point of a telephone call to access the Internet through an ISP."² In a carefully reasoned and well-supported decision, the PUC convincingly answered "No." The FCC should reach the very same conclusion.

This debate over the proper regulatory treatment of dial-up traffic to ISPs -- and the Internet generally -- is not a mere academic exercise. Over the past twenty years, the United States has benefited enormously from far-sighted government policies designed to prevent the information service market from being burdened by unnecessary and costly common carrier-type regulation. In the Telecommunications Act, Congress recognized as a matter of law that the government must "preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, unfettered by Federal or State regulation."³ Thanks to this kind of philosophy, information services have not been subject to excessive, subsidy-laden access charges, or universal service obligations, or tariffing requirements, or intrusive governmental oversight. Partly as a result, the Internet in recent years has been able to explode onto the American scene with a power and appeal to consumers unmatched in recent history. Indeed, Epoch would argue that much of this country's continued economic growth and success in the future will ride on the continued growth and success of the Internet.

Within that context, the Commission must consider the impact of its decision making, both on residential consumers and the Internet alike. In particular, if any FCC decision leads to flat-rated local calls becoming per-minute toll calls, consumers will pay significantly more money to phone companies just to be able to reach their local ISP. As the Internet becomes too expensive for many consumers, usage inevitably will drop, and the unlimited prospects for electronic commerce will suffer accordingly. No federal policymaker should desire the resulting "digital divide" between "Information Haves" and "Have Nots." Further, any FCC action perceived to be inviting federal common carrier-type regulation of ISPs, and denying them competitive choices for local service, puts the very success of the Internet at considerable risk.

In the collective words of Commissioners Furchtgott-Roth and Tristani criticizing the reasoning in the GTE ADSL Tariff Order, the issue of the jurisdictional nature of traffic terminating to ISPs is "of enormous importance to many businesses, industries and consumers today, and doubtlessly many more tomorrow." Epoch wholeheartedly agrees with this assessment, and urges the Commission to carefully and cautiously evaluate the likely negative impact on consumers and the information services industry before proceeding with any jurisdictional decision that threatens the unfettered and regulation-free nature of the Internet.

Sincerely,



Scott Purcell
President

cc: Commissioner Susan P. Ness (Room 832)
Commissioner Harold W. Furchtgott-Roth (Room 802)
Commissioner Michael K. Powell (Room 844)
Commissioner Gloria Tristani (Room 826)
Kathy Brown, Chief of Staff, Chairman Kennard (Room 814)
Larry Strickling, Chief, Common Carrier Bureau (Room 500)

² See Public Utilities Commission of the State of California, Rulemaking 95-04-043, Investigation 95-04-044, Decision 98-10-057, dated October 22, 1998 (slip op.), at 7.

³ 47 U.S.C. Section 230(b)(2).